SUBJECT INDEX

TABLE OF CASES CITED

STATUTES AND OTHER AUTHOHITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

NO......

J. G. GLOVER, Petitioner and Appellant below,

VS.

UNITED STATES OF AMERICA, Respondent and Appellee below,

Petition for Wirt of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Brief in Support Thereof.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, J. G. GLOVER, respectfully shows:

1.

STATEMENT OF MATTER INVOLVED:

Petitioner was indicted in the Atlanta Division of the United States Court for the Northern District of Georgia for an alleged violation of the Mail Fraud Statute, (Title 18, Section 338 USCA). The indictment contained twenty counts and each count charged the same scheme to defraud and the only difference in the various counts was that each count alleged the use of the mails on a different occasion. (R. 5-44). The jury upon the trial of the case found the petitioner guilty upon all twenty counts. A motion for new trial was granted on two counts and overruled on the other eighteen (R. 702). The petitioner received a sentence on each count of a year and a day with the sentence on each count running concurrently. The case was appealed to the Circuit Court of Appeals for the Fifth Circuit and was heard by Circuit Judges Foster, Holmes and Hutcheson and affirmed by a two-to-one decision, with Circuit Judge Hutcheson dissenting (The Majority Opinion— R. 715-720) (The Minority Opinion— R. 720-725).

The judgment affirming the lower court was entered in the Circuit Court on the 23rd day of January, 1942, (R. 726) and, on February 10th, 1942, petitioner filed his motion for a rehearing in said case (R. 727), and, on the 23rd day of March, 1942, the motion for a rehearing was denied (R. 821).

From April, 1937, until after the indictment in this case in September, 1940, J. G. Glover was employed by the State Highway Board of Georgia, a department of said state, as Supervisor of State Forces. As Supervisor of State Forces he had charge of and supervision of the building of State Highways with State Convicts.

In connection with the building of highways with convict forces the State employed a great many other persons who worked with and in connection with the convict forces in road construction. All of this was done under the supervision of the State Highway Board of Georgia. The position held by petitioner was not a statutory position but that of an employee of the State Highway Board.

The petitioner had an office in the State Highway Office Building in the City of Atlanta, Georgia, and from his office in Atlanta supervised the activities of the various convict camps, acting through a warden for each camp who had immediate charge of the activities of the convict forces in the building of the roads. Petitioner as Supervisor of such forces made occasional visits and trips from one camp to another for the purpose of supervising the activities of the convict forces and the employees working in connection with them.

The wardens had immediate charge of the convict forces and other persons employed in each of these camps and petitioner had under his supervision from five to fifteen camps at a time. These convict camps were placed in most instances in out of the way places in the State and are used mostly for grading roads, the building of bridges and culverts necessary for drainage and making all preparations in the road necessary for paving.

At each camp buildings were constructed for housing the convicts and civilian employees and, in most instances, nearby a house was constructed for the purpose of housing the warden and the members of his family.

During Glover's employment by the State Highway Board of Georgia he had supervision of camps at

twenty-seven different locations. Near two of these camp sites Glover acquired title to small tracts of land and in another instance title was conveyed to him through mistake (R. 161, 551). These three camps were located in the counties of Dade, Dawson and Miller and on these three tracts of land the wardens in charge of the three convict camps constructed houses in connection with the camps to be used for housing the wardens and the members of his family in each particular instance. (R. 74, 130, 161, 555, 557, 559, 560, 562).

The Government indicted petitioner on account of these houses being constructed upon lands for which deeds had been executed conveying title to him and charged him with devising a scheme and an artifice to defraud the State of Georgia, the State Highway Board of Goergia and the citizens and taxpayers of Georgia by reason of these houses having been constructed upon his lands.

It was admitted in the case that the houses were constructed by the wardens with convict labor and other labor paid for by the State Highway Board of Georgia and that the material going into the construction of the houses was paid for by the State Highway Board of Georgia.

The use of the mails as charged in the indictment was the usual and ordinary routine mailing of requistions for material, payrolls and checks in payment of materials and supplies by the State Highway Department which, were alleged to have gone into the construction of the three wardens' houses. (R. 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44).

The indictment alleged that the scheme or artifice to defraud consisted of petitioner violating and disregarding the plan, rule and practice of the Highway Board which was alleged to be as follows:

> "That it was the plan, rule and practice of said State Highway Board that the barracks and all of the buildings including houses for wardens necessary for said prison camps should be constructed upon lands leased for that purpose by said Highway Board from individuals with the provision that when said lands ceased to be used for the purposes of said Highway Board that said leases would be terminated and all of the buildings constructed upon said leased premises would become the property of the owner of the lands which were leased, and it was the further plan, rule and practice of said Highway Board that all of the buildings were to be constructed of rough and undressed lumber only, all of which defendant well knew." (R. 8).

The indictment further alleged that petitioner disregarded the plan, rule and practice as set forth above, and that he would build houses "more elaborate in design and construction than was necessary for such wardens' houses" (R. 9) and that said houses became the sole property of the defendant as follows:

> "and that such valuable houses would not and should not be constructed and indeed were not constructed upon lands leased from individuals as was the plan, rule and practice of said Highway Board, but would be and should be built, and indeed were built, upon defendant's own

land to which he had title individually in fee simple, and that said houses and dwellings having become attached to the realty of the defendant would be and should be, and in fact did become, the sole property of defendant;" (R. 9).

The indictment further charged that the petitioner deceived the three members of the State Highway Board in the following language:

"would and should, and in fact did, falsely and fraudulently deceive and mislead the said Highway Board in the payment of all bills for labor and material used in the construction of the houses and dwellings upon defendant's property and in the furnishing of said labor and other materials used in the construction thereof, and that defendant would and should, and in fact did, thereby, by means of such false and fraudulent pretenses and misrepresentations, pretend and represent that all of the houses and dwellings constructed in connection with such State prison convict camps were built and constructed in accordance with the usual and customary plan and practice of said Highway Board, concealing the fact that same were in truth and in fact built upon the lands of the defendant and built of more elaborate and expensive design and construction than was necessary and proper, all of which pretenses and representations were false and untrue, as defendant then and there well knew." (R. 10, 11).

As a result the indictment alleged that petitioner defrauded the State Highway Board of Georgia, the State of Georgia, and the people of the State of Georgia of the sum of ten thousand dollars.

The State Highway Board of Georgia approved of the building of these three houses by petitioner with full knowledge of all the facts (R. 248, 485). When the three wardens' houses were completed the wardens, who are employees of the State, moved into and occupied said houses and there was no claim of any dominion, right or ownership of said houses at any time by petitioner and the State of Georgia continued in uninterrupted possession of same (R. 485), until two of them were torn down and removed from petitioner's lands. (R. 695, 701).

During the trial of the case in the District Court which began on the 4th day of November, 1940, and ended on the 3rd day of December, 1940, the State failed to prove the rule, plan and practice of the State Highway Board as alleged in the indictment, that the three houses became attached to the realty of petitioner and that he became the sole owner thereof, that he deceived or misled the members of the State Highway Board in any manner whatsoever, or that the State of Georgia or any agency of the State had been defrauded.

In reference to the rule, plan and practice of the State Highway Board as alleged the Government conceded that it had not shown the existence of a rule requiring that the houses be constructed of rough and undressed lumber (Charge of Court, R. 680). As to the balance of the rule all four men who had been members of the State Highway Board during the time petitioner worked for said Board testified there was no such rule. (R. 240, 241, 242, 278, 279, 304, 305, 342, 417, 418).

The Secretary and Treasurer of the Board and several wardens testified that there was no such rule, plan and practice as alleged in the indictment. (R. 152, 389, 390, 391, 394, 395, 405, 406, 407).

As a matter of fact the Government's own testimony proved a different rule, plan and practice of the State Highway Board.

Your petitioner testified that there was no such rule, plan or practice. (R. 496, 498, 500). The uncontradicted testimony as to all witnesses for both the Government and the defense was that there was no such practice as alleged in the indictment to be the rule, plan and practice of the Highway Board. In this connection the majority opinion of the Circuit Court of Appeals for the Fifth Circuit held as follows:

> "The indictment charged that the procedure followed by the appellant in building these houses violated the established plan, rule and practice of the state highway department. This allegation was surplusage and the failure of the proof to substantiate it had no effect upon the validity of the conviction." (R. 719).

As to the practice of the Board, Circuit Judge Hutcheson in his dissent said:

> "The uncontradicted proof that there was no such practice on the part of the Board and particularly that the houses were placed on the defendant's property under circumstances which, under the law of Georgia, prevented their becoming attached to the realty or in any way becoming his, completely negatived the charge and entitled the defendant to an instructed verdict of acquittal." (R. 724).

There was absolutely no evidence in the record to the effect that the three houses involved became a part of petitioner's realty and, therefore, his sole property. On the contrary, the three wardens who built the houses and petitioner swore positively that the houses were placed on the lands under a parol agreement or permission that the land was to be used without the payment of rent and that the houses were to be removed by the State Highway Department when they ceased to be used by the State Highway Department. (R. 124, 130, 74, 162, 564, 565, 573, 574). This testimony was positive, unimpeached and uncontradicted by any testimony or circumstance produced during the long days of the trial and the parol agreement under the law of Georgia had the effect of creating an easement running with the land and gave them the right to the use of the land for the purpose of placing the houses thereon and removing them under the law of Georgia.

The majority opinion of the Circuit Court of Appeals dismissed this question by saying that it was wholly immaterial in the following language:

> "Whether appellant's statements in conversation with the wardens to the effect that the houses were removable by the Board, would be considered a binding agreement between Glover and the Board, which would create an easement in favor of the Board under the real property law of Georgia, is wholly immaterial." (R. 718).

Circuit Judge Hutcheson in his dissent said in this connection:

> "These circumstances, established by the undisputed testimony of defendant and the two wardens who caused the houses

> to be built and lived in them, are that they were placed on defendant's property for the use of the state and under an agreement and understanding that they were subject to removal at the state's will." (R. 721, 722).

Circuit Judge Hutcheson states positively that the testimony in this connection was undisputed. Circuit Judges Foster and Holmes evidently took it for granted that the testimony in this connection was undisputed and binding upon the Court because they waved it aside by saying that the whole matter is wholly immaterial.

Likewise, there was no evidence in the record to the effect that petitioner deceived or misled the members of the State Highway Board in any manner whatsoever. As a matter of fact, the members of the State Highway Board at the time of the transactions involved testified positively that there had been no deceit on the part of petitioner. (R. 252, 307, 426). The fourth member who was at one time a member of the Board did not mention in his testimony any deceit or effort to conceal anything on the part of petitioner. (H. 276-280).

There was absolutely no evidence produced upon the trial of this case to the effect that the State of Georgia, the State Highway Department or the people of Georgia had been defrauded. The uncontradicted testimony of the members of the Highway Board was to the effect that the houses were in their possession at the time of the trial, had at all times been used by the wardens and had at all times been in possession of the State. The Government in its argument on the trial of the case contended that neither the State of Georgia nor the State Highway Board were actually defrauded by petitioner (R. 697, paragraph 4).

The State Highway Board took the position that the State had not been defrauded (R. 485). The houses were in the possession of the State at all times and petitioner never at any time claimed any right to them (R. 485). Petitioner gave to the State Highway Board written authority to remove the houses when ceased to be used by the State (R. 485). The State was in possession of the houses at the time of the trial and had been at all times before then (R. 485).

After petitioner's trial and conviction two of the houses involved were removed from petitioner's lands by the State Highway Board (R. 695-701).

Petitioner respectfully shows that there was not introduced upon his trial any evidence showing any intent on his part to defraud the State or the State Highway Board. He had a definite and clear understanding with the wardens at each place where houses were built on his land in which he gave to the State the permission to use his lands and permission to remove said buildings before their erection began (R. 124, 130, 74, 162, 564, 565, 573, 574). This testimony was undisputed, unimpeached and uncontradicted by any witnesses or any circumstance in the case and, therefore, binding upon the Court, and negatived any idea whatsoever of any intent on his part to defraud the State Highway Board or the State of Georgia.

The uncontradicted evidence of witnesses both for the Government and the petitioner proved that the rule, plan and practice of the Highway Board was not as alleged in the indictment but that the practice was to get permission, either orally or in writing, to use the lands of others and to build wardens' houses thereon and to remove the houses when the lands ceased to be used by the State.

The only conflict in the evidence was as to the estimated cost of the houses and this evidence was mere guesswork on the part of the witnesses.

At the conclusion of all the evidence in the case petitioner upon his trial moved the Court for a directed verdict, which motion was overruled, and then appealed his case to the Circuit Court of Appeals for the Fifth Circuit (R. 693, 674).

Petitioner also made timely written requests to charge which were overruled (R. 691-695).

The petitioner also made a motion for a new trial which was overruled by the Court on eighteen counts (R. 695-702).

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925 (Section 347, Title 28, U. S. C. A.).

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered on January 23rd, 1942 (R. 715). On February 10th, 1942, within the time allowed by the rules of said Court, petitioner filed a petition for rehearing (R. 727), which petition was denied and judgment entered March 23rd, 1942 (R. 821).

On the 20th day of April, 1942, within thirty days from the entry of said judgment this petition for a writ of certiorari is filed.

III.

QUESTIONS PRESENTED.

(1) To prove the existence of a scheme or artifice to defraud substantially as alleged in the indictment was it necessary for the Government to prove the rule, plan and practice of the State Highway Board of Georgia to be substantially as alleged in the indictment?

(2) To prove the scheme substantially as alleged in the indictment was it necessary for the Government to show that the houses involved became a part of petitioner's realty and, therefore, his property?

(3) Is it essential that the Government prove the existence of a scheme which, if successful, is calculated to defraud?

(4) Can the District Court or the Circuit Court of Appeals arbitrarily disregard the positive, unimpeached and uncontradicted testimony of witnesses?

(5) Should a conviction be sustained upon flimsy circumstantial evidence in the face of positive, unimpeached and uncontradicted testimony of witnesses when the circumstances are as consistent with the innocence of the petitioner as with his guilt?

(6) Can a conviction be sustained in this case in the face of the fact that the Government had failed to prove the existence of the scheme it alleged, or indeed of any scheme calculated to defraud, or of any actual fraud itself or that the houses became a part of petitioner's realty, upon the theory that the evidence justified the jury in reaching the conclusion that the petitioner, entertaining the hope or wish in

his heart that the State might fail or forget to remove the houses, permitted the wardens to build more expensive houses on his land than had been built on lands of others from whom permission had been obtained to build houses on their lands and to remove them when the State ceased to use them?

(7) Could the petitioner's property in this case have been materially enhanced in value, and State funds wrongfully diverted into his personal channels, when, according to the undisputed and uncontradicted testimony in the case, the houses were built upon his lands under a clear and definite agreement with the wardens that the lands could be used, the houses erected and the houses removed when the lands ceased to be used by the State, when such an arrangement was in keeping with the established practice of the State Highway Department and had the approval of the State Highway Board?

(8) Should the District Court have submitted to the jury petitioner's defense as requested in writing?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The District Court failed to direct a verdict of not guilty upon petitioner's motion and the Circuit Court of Appeals for the Fifth Circuit committed error in affirming this judgment.

(2) The Circuit Court of Appeals committed error in holding that the allegation in the indictment as to the rule, plan and practice of the State Highway Board was surplusage and the failure of the proof to substantiate it had no effect upon the validity of the conviction (R. 719).

(3) The Circuit Court of Appeals for the Fifth Circuit committed error in holding in reference to the question of whether or not the houses involved became a part of petitioner's realty under the permission given by him to the wardens to build the houses was wholly immaterial when it was alleged in the indictment as the gist of the scheme or device to defraud that the houses became a part of the realty and, therefore, the sole property of petitioner (R. 718).

(4) The Circuit Court of Appeals for the Fifth Circuit committed error in holding that the facts in this case show that petitioner's property was materially enhanced in value and that State funds were wrongfully diverted into personal channels (R. 719) when the undisputed, uncontradicted and consistent testimony of witnesses showed that the houses were placed upon petitioner's lands with a clear understanding that the State was to use the lands for the purpose and the houses were to be removed when the State ceased to use the lands (R. 719).

(5) The Circuit Court of Appeals for the 5th Circuit committed error in holding that the District Court's failure to give properly requested instructions to the jury relating to the effect under Gerogia law of a verbal agreement for the removal of buildings from the lands of another was not error.

(6) The Circuit Court of Appeals for the 5th Circuit committed error in affirming the refusal of the District Court to direct a verdict upon motion and to give the requested written charges for the reason that the effect of their holding is to say that under the Federal law it is not necessary for the Government to prove a definitely formulated plan or scheme which was calculated, if carried out, to defraud, but, upon proof of their desires or imaginings, they can be found guilty, and sanctions the use of the Mail Fraud

Statute as a catch-all like the old common law conspiracies, which were used in England, for convicting persons just because they were deemed undesirable.

(7) The Fifth Circuit Court of Appeals in affirming the refusal of the District Court to give the requested charges and to direct a verdict ignored the positive, unequivocal, unimpeached and uncontradicted testimony of witnesses when all the circumstances of the case were more consistent with the innocence of petitioner than with the guilt.

(8) The Circuit Court of Appeals erroneously affirmed the actions of the District Court in failing to grant a motion for a directed verdict when it appears from the record that no scheme or device was established which, if successful, was calculated to defraud.

The Circuit Court of Appeals in this case has rendered a decision in conflict with the decisions of the Circuit Court of Appeals for the Ninth and Sixth Circuits on the same matter and has decided a Federal question in conflict with applicable decisions of this Court.

The Circuit Court of Appeals has also decided the above important questions of general law in a way untenable and in conflict with the weight of authority.

The Circuit Court of Appeals in affirming the District Court in its refusal to direct a verdict or to give requested charges has held in effect that under the Federal law it is not necessary for the Government to prove the plan or scheme to defraud as alleged in the indictment, that it is not necessary to prove a definitely formulated plan or scheme which is calculated, if carried out, to defraud, but sanctions the

use of the Mail Fraud Statute as a catch-all, as the old common law conspiracies were used in England whereby persons could be tried upon mere suspicions or for their desires and imaginings and, in so doing, has so far departed from the accepted and usual course of judicial proceedings and, in affirming the lower court, has sanctioned such a departure by a lower court, as to call for an exercising of this Court's power of supervision.

In holding that it is not necessary to prove the rule, plan and practice of the State Highway Board of Georgia, as alleged in the indictment, and in holding that it is not necessary to prove that the houses placed upon petitioner's lands became a part of his realty, as alleged in the indictment, has decided an important question of general law in a way which is untenable and in conflict with the weight of authority.

In holding as above set forth the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower court as to call for the exercising of this Court's power of supervision.

The effect of this decision is such that the Supreme Court should take jurisdiction of this case and definitely settle to what extent the Mail Fraud Statute may be used as a catch-all. In this case there was nothing wrong with the use of the mails as the items alleged to have been mailed were routine transmissions of ordinary payrolls, requisitions, etc., of a department of the State of Georgia. It was admitted by the Government that there was no actual fraud. The uncontradicted testimony of the Government's witnesses, as well as petitioner's witnesses, was to the effect that the State of Georgia had not been defrauded. The Circuit Court of Appeals in its opinion admits

that the Government did not prove the formation or the existence of a scheme or device to defraud as alleged in the indictment. The Government offered no positive evidence and relied entirely upon circumstantial evidence and if the verdict in this case is allowed to stand it must be based upon flimsy circumstantial evidence in the teeth of the positive testimony of uncontradicted and unimpeached witnesses. If a verdict is allowed to stand it must be solely upon the theory that in the teeth of this kind of testimony and the failure of the Government to prove the essential allegations of its indictment, the jury is permitted to say that based upon flimsy circumstances that the petitioner intended in his heart to defraud in some method or manner not definitely shown and, for that reason, is to be convicted.

It is well recognized by lawyers familiar with criminal trials that less evidence is required to convict in a prosecution under the Mail Fraud Statute than is required to recover in an ordinary civil suit. Therefore, this case presents an important question of Federal law which has not been, but should be, settled by this Court so as to definitely determine how far and to what extent the Federal Courts are to be permitted to go in using the Mail Fraud Statute in such a manner so as to prevent the same abuses as resulted from the use of the old law of conspiracies in England.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit in the case numbered and entitled on its docket No. 9921, J. G. Glover, appellant, vs. The United States of America, appellee, to the end that said case may be reviewed and determined by this Court, and that the judgment of said Circuit Court of Appeals be reversed and set aside by this Court.

Dated this the 20th day of April, 1942.

J. G. GLOVER,

By:.....

Roy V. Harris

.....

W. Paul Carpenter

Attorneys for Petitioner

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF COURT BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit appears in full in the record (R. 715-725). Said case has not been reported in the advance sheets of the Federal Reporter, 2nd Series, as yet.

II.

JURISDICTION.

The jurisdictional statement will be found in the petition for writ of certiorari and is incorporated here by reference.

III.

STATEMENT OF CASE.

So far as is material to the questions here presented the statement of the case will be found in the petition for the writ of certiorari under "Statement of matter involved" and is incorporated here by reference.

IV.

SPECIFICATIONS OF ERROR.

(1) The Circuit Court of Appeals erred in holding that the conviction of petitioner should be affirmed.

(2) The Circuit Court of Appeals erred in affirming the District Court's refusal to direct a verdict of not guilty.

(3) The Court of Appeals erred in holding that there was sufficient evidence in the record to support the verdict of the jury.

(4) The Circuit Court of Appeals erred in holding that the agreements had between petitioner and the wardens who built the houses in question were wholly immaterial so far as this case is concerned.

(5) The Circuit Court of Appeals erred in holding that the allegations contained in the indictment charging that the procedure followed by the petitioner in building the houses in question violated the established plan, rule and practice of the State Highway Department was mere surplusage and the failure of the proof to substantiate it had no effect upon the validity of the conviction.

(6) The trial court erred in refusing to direct a verdict and the Circuit Court of Appeals erred in giving sanction to said error for the following reasons:

(a) There was absolutely no evidence produced during the trial to support the verdict.

(b) Because the uncontradicted probable testimony of witnesses for the Government and the petitioner demanded a finding of not guilty.

(7) The trial court erred in refusing to submit the petitioner's defense to the jury in accordance with the written requests to charge, and the Circuit Court of Appeals erred in giving sanction to said error, because the written requests to charge were vital to petitioner's defense.

V.

SUMMARY OF ARGUMENT.

1. A verdict of acquittal should have been directed.

(a) The Government failed to prove the scheme as alleged.

(1) No proof of rule, plan and practice of the Highway Board as alleged.

(2) No proof that houses became part of the realty.

(3) Uncontradicted proof that rule, plan and practice was different from that alleged.

(4) Uncontradicted testimony was that houses were placed upon lands under parol permission with leave to remove.

(5) Parol permission to erect houses gives right of removal under Georgia law.

(6) Uncontradicted and probable testimony binding on District Court and Circuit Court of Appeals.

(b) No scheme was proved which was calculated to defraud.

(c) No evidence of intent to defraud.

2. It was error for the Circuit Court of Appeals to hold that proof of the rule, plan and practice of the Highway Board as alleged in the indictment was surplusage.

3. It was error for the Circuit Court of Appeals to hold that it was wholly immaterial whether the Government proved the houses were placed on the lands of petitioner under circumstances which made them a part of his realty and therefore his property.

4. The trial court should have charged the jury as requested.

VI.

ARGUMENT.

(1) VERDICT OF ACQUITTAL SHOULD HAVE BEEN DIRECTED:

(a) Circuit Judge Hutcheson went directly to the gist of this case when he said in his dissenting opinion:

> "Here, the charge was that defendant, relying upon a settled practice of the Board to place the houses on the properties under conditions which would attach them to the realty and to leave them on the properties when the wardens were through with their use, schemed to place houses on his own lands under circumstances which would make them a part of the realty and therefore his property. The uncontradicted proof that there was no such practice on the part of the Board and particularly that the houses were placed on the defendant's property under circumstances which, under the law of Georgia, prevented their becoming attached to the realty or in any way becoming his, completely negatived the charge and entitled the defendant to an instructed verdict of acquittal." (R. 724).

The indictment charged that the Highway Board of Georgia had a rule, plan and practice to build wardens houses on lands leased from individuals with the understanding that when said lands ceased to be used that the buildings constructed on the premises would become the property of the owners of the land and that the buildings were to be constructed of rough and undressed lumber only, and that knowing

this rule, plan and practice the petitioner caused the houses involved in this case to be built upon his lands and that they became a part of the realty. All of the evidence offered by the Government and petitioner shows that there was no such rule. (R. 240, 241, 242, 278, 279, 304, 305, 345, 417, 418, 152, 389, 390, 391, 394, 395, 405, 406, 407).

The majority opinion of the Circuit Court of Appeals held that these allegations in the indictment were mere surplusage and the failure of the proof had no effect upon the validity of the conviction. (R. 719).

On the other hand all of the witnesses testified that the rule, plan and practice was to get permission from the owners of the lands to build wardens' houses on their lands, to use the lands for this purpose and to remove the houses when the lands ceased to be used for the purpose.

Following this established practice of the Highway Board the petitioner gave the three wardens where the three houses involved in this case were constructed permission to build the houses on lands title to which had been deeded to him with the understanding that when they ceased to be used by the State Highway Board the houses and improvements were to be removed (R. 124, 130, 74, 162, 564, 565, 573, 574). This positive unimpeached and uncontradicted testimony as to the facts surrounding the construction of the houses involved on the lands deeded to petitioner was waved aside by the majority opinion of the Circuit Court of Appeals with the statement that the entire matter was wholly immaterial (R. 178).

There was no proof that the houses became a part of the realty and the uncontradicted testimony referred to above shows without a doubt that the houses were placed upon the lands of petitioner under

circumstances by which they could never become a part of petitioner's realty and title therefore vest in him.

The law of Georgia and the general law recognizes the validity of such parol agreements for the use of land.

Section 85-1404 of the Code of Georgia provides as follows:

> "85-1404. (3645). PAROL LICENSE; REVOCATION; EASEMENT RUNNING WITH LAND.—A parol license is primarily revocable at any time, if its revocation does no harm to the person to whom it has been granted; but is not revocable when the licensee has executed it and in so doing has incurred expense. In such case it becomes an easement running with the land. (3 Ga. 87; 49 Ga. 19; 53 Ga. 247; 69 Ga. 115; 93 Ga. 74; 19 S. E. 820)."

In regard to the right of removal of improvements made on land with the owner's permission we find the following in 31 Corpus Juris, page 310:

> "The improvements belong to the owner of the land when made under a stipulation to this effect. But where an improvement, such as a building, is put upon the land of another, by his permission, under an agreement or understanding that it shall belong to the occupant or may be removed at any time, it does not become a part of the real estate, but continues to be personalty, and the property of the person making it. If the improve-

> ment is made by the owner's permission, an agreement that it shall remain the property of the person making it is implied in the absence of any other facts or circumstances showing a different intention, but such an implication will not be drawn when a different intention is indicated by an express agreement between the parties, or from the interest of the party making the improvement or his relation to the title to the land."

And on page 312, Section 8, Volume 31 of Corpus Juris, we find:

> "By agreement — The right of removal may be given by express agreement between the owner and the occupant, or by an agreement implied from the circumstances, as from the owner's permission to make them."

And in volume 37 of Corpus Juris, page 296, we find the following:

> "Where a license to use property for specific purposes is not specially restricted, and is coupled with a grant or interest necessary to the possession and enjoyment of the rights acquired, the license is irrevocable so long as the interest continues. Upon this principle, where one places his property on the premises of another by virtue of a contract or by the landowner's permission, the implied license to enter and remove it is irrevocable."

In reference to the granting of a parol license and the right of removal of buildings erected under a

parol license we cite the cases of AINSLEE v. EASON & WATERS, 107 Georgia, 748, and CHARLESTON RAILWAY COMPANY & HUGHES, 105 Georgia, 15.

In this connection we wish to cite the case of MAYOR AND COUNCIL OF GAINESVILLE v. DUNLAP, 147 Georgia, page 344. We quote, headnote four, from said decision as follows:

> "Where in order to reach the reservoir the City laid a water main through the lands of others under a lease or parol license which was silent as to the rights of removal of the pipe or pipes, the laying of the pipes not being for the improvements of the realty but for the use of the City in the operation of its waterworks, the pipes are in nature of trade fixtures and removable at any time by the City without the consent of the landowners."

The ruling of the Circuit Court of Appeals in holding that there was sufficient testimony to support the verdict and affirming the refusal of the District Judge to direct a verdict for the petitioner is a decision on an important question of general law which is untenable and in conflict with the weight of authority and in conflict with applicable decisions of ths Court.

This Court has held in the case of U. S. v. HESS, 124 U. S. 483, 8 Supreme Court Reporter, 571, as follows:

> "The statute is directed against "devising or intending to devise, any scheme or artifice to defraud", to be effected by communication through the postoffice.

> As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised, or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial."

It is elementary that the Government must prove all of the essential averments of the indictment and in this case it was essential to prove that the petitioner acted under a settled practice of the Highway Board substantially as alleged in the indictment under conditions which would attach the houses to the realty and leave them on the properties when the wardens were through with their use. The evidence failed to show that the houses were placed upon his lands under the circumstances alleged in the indictment and, therefore, the Government failed to prove these essential elements.

In the case of the U. S. v. HESS, 124 U. S., 483, this Court held:

> No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially, or by way of recital."

A fraudulent scheme is an essential element in the crime of using the mails to defraud and the failure to allege the scheme to defraud and to prove it substantially as alleged is fatal to the prosecution. AIKEN v. U. S., 108 Federal 2nd, 182.

In the case of FASULO v. U. S., 272 U. S., 620, 47 Supreme Court Reporter, 281, this court said the

words "to defraud" primarily mean "to cheat; they usually signify the deprivation of something of value by trickery, deceit, chicane, or over-reaching."

The uncontradicted testimony is that the houses in question were placed on petitioner's lands under a well known practice of the State Highway Department that permission would be secured from others to erect wardens' houses on their lands with the understanding that they were to be removed when ceased to be used by the Department, and that the houses involved in this case were placed on his lands under a definite understanding between the wardens and petitioner that his lands were to be used for the purpose, and the houses and improvements were to be removed when the lands ceased to be used by the Department.

The Government relied entirely upon circumstantial evidence and we insist that this uncontradicted testimony as to the practice of the Highway Board and as to the agreement between the wardens and the petitioner is binding upon the District Court and was binding upon the Circuit Court of Appeals. Therefore, the decision and judgment of the Circuit Court of Appeals has decided an important question of general law which is untenable and in conflict with the weight of authority, and a Federal question in conflict with applicable decisions of this Court.

In this connection we submit the following:

VOLUME 23 CORPUS JURIS, page 47, Section 1791:

> "UNCONTROVERTED EVIDENCE.
>
> Uncontradicted evidence should ordinarily be taken as true, and cannot be wholly discredited or disregarded if not opposed

> to probabilities or arbitrarily rejected, even though the witnesses are parties or interested——."

VOLUME 23 CORPUS JURIS, page 49, Section 1792:

> "There is, however, no rule that circumstances sufficient to establish a fact shall have the force and effect of the direct testimony of at least one credible witness, and indeed it has been said that circumstantial evidence is inferior in cogency and effect to direct evidence."

In the case of CHESAPEAKE & O. RY. CO. v MARTIN, ET. AL., 283 U. S., 209, 51 Supreme Court Reporter, 453, on page 456 of the 51 Supreme Court Reporter, the Supreme Court of the United States said:

> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been

shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of the opinion that this was not enough to take the question to the jury, and that the court should have so held."

In this case the Supreme Court also held:

"In M. H. Thomas & Co. v. Hawthorne, supra, at page 972 of 245 S. C., the rule is thus stated:

"A jury cannot arbitrarily discredit a witness and disregard his testimony in the absence of any equivocation, confusion, or aberration in it. It is not proper to submit the uncontradicted testimony to a jury for the sole purpose of giving the jury an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness. The testimony must inherently contain some element of confusion or contrariety, or must be attended by some circumstance which would render a total disregard of it by a jury reasonable rather than capricious, before a peremptory instruction upon the evidence can be said to constitute an invasion of the right of trial by jury. That it is proper for a trial court to instruct a verdict upon the uncontradicted testimony of interested parties, when it is positive and unequivocal and

there is no circumstance disclosed tending to discredit or impeach such testimony, can be said to be a settled rule in Texas."

The Court of Appeals of Georgia in the case of the ATLANTIC COAST LINE RAILROAD CO. v. DRAKE, 21 Georgia Appeals, page 81:

"If material to the issue between the parties, the uncontradicted testimony of an unimpeached witness cannot in any case be arbitrarily disregarded by any tribunal, whether judge or jury, whose duty it is to consider the evidence and decide the issue in accordance therewith. Where, therefore, as a result of proved facts, only a prima facie presumption arises that certain additional facts exist in favor of one party, and positive, unequivocal, and uncontradicted testimony is introduced in behalf of the other party, emphatically denying the facts thus presumed, such presumption is legally rebutted and can not prevail against such testimony."

The Supreme Court of Georgia in the case of FRAZIER v. GEORGIA RAILROAD AND BANKING COMPANY, 108 Georgia, page 807, held:

"When a plaintiff's right to recover depended upon the establishment of a particular fact, and the only proof offered for this purpose was circumstantial evidence, from which the existence of such fact might be inferred, but which did not demand a finding to that effect, a recov-

> ery by the plaintiff was not lawful, when, by the positive and uncontradicted testimony of unimpeached witnesses, which was perfectly consistent with the circumstantial evidence relied on by the plaintiff, it was affirmatively shown that no such fact existed."

We respectfully submit that all of the circumstances in this case are more consistent with the innocence than with the guilt of the petitioner. However, in the case last above cited it has been held in Georgia that unless the circumstantial evidence was of such a character as to demand a finding, that a verdict is not lawful which ignores positive and uncontradicted testimony of unimpeached witnesses. This Court in the case of PENNSYLVANIA R. CO. v. CHAMBERLAIN, 288 U. S., 333, 53 Supreme Court Reporter, 391, said:

> "We, therefore, have a case belonging to that class of cases where proven facts given equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the the other, before he is entitled to recover. United States F. & G. Co., v. Des Moines Nat. Bank (C. C. A.) 145 F. 273, 279, 280, and cases cited, Ewing v. Goode (C. C.) 78 F. 442, 444; Louisville & N. R. Co., v. East Tennessee, V. & G. Ry. Co. (C. C. A.) 60 F. 993, 999; Tucker Stevedoring Co. v. W. H. Gahagan (H. C.) 6 F. (2d) 407, 410; Blid v. Chicago & N. W. R. Co., 89 Neb. 689, 691, et. seq.—"

The rule established in the case of the Pennsylvania Railroad Company v. Chamberlain, supra, was a civil case and, if the burden there set forth applies in civil cases, there should certainly be a greater burden in a criminal case resting upon the Government.

Does the fact that the houses were placed upon lands of petitioner raise any presumption against petitioner? We think not. However, the only proof the Government has is the fact that the housese were placed upon his lands and the petitioner and all of the witnesses, both for the Government and petitioner, by positive and uncontradicted testimony explained all of the circumstances surrounding the construction of these houses on his property. The uncontradicted testimony is that petitioner gave the wardens in each instance permission to place the houses on his lands with the understanding that they would be removed by the State when the lands ceased to be used for the purpose. In addition to this the State Highway Board approved the entire transaction and petitioner confirmed the original understanding in writing to the State Highway Board (R. 485). The placing of these houses on the lands of petitioner was done under a long established practice of the Highway Board which was definitely established and proved.

Therefore, if there had been any presumption which arose upon proof that the buildings were placed upon his lands that presumption has been by uncontradicted testimony explained and the burden is upon the Government.

In the case of MACON, D. & S. R. CO. v. STEPHENS, 19 South Eastern Reporter, 2d Series, page 32, the Court of Appeals of the State of Georgia said:

> "In action against railroad for damages for killing of cattle, presumption of negligence created by proof that cattle were killed by train was rebutted when railroad introduced testimony of engineer and fireman which clearly explained every material fact connected with the killing, and the burden was on plaintiff to show by evidence without the aid of the statutory presumption that the killing of the cattle was caused by negligence of railroad's employees. Code, Section 94-1108."

In the above cited case there was a statutory presumption against the railroad and they hold that even the statutory presumption is overcome and that the burden then rests upon the plaintiff when the material facts connected with the killing were explained.

This is a criminal case and there is no statutory presumption. On the other hand, there is a presumption in favor of petitioner and in favor of his innocence which should remain with him throughout the trial of the case.

(b) It is admitted by both the majority and the minority opinion of the Circuit Court of Appeals that the scheme to defraud as alleged in the indictment failed of proof. As a matter of fact, no scheme of any kind was proved which was calculated to defraud. The Government's own witnesses testified that the houses were placed upon petitioner's lands under such circumstances that the houses and improvements could never be his and that they at all times would and did remain the property of the State Highway Board. Petitioner's testimony and the testimony of the other witnesses confirmed this and there was not a single

circumstance in the case to the contrary. The majority opinion waved this question aside by saying that it was wholly immaterial (R. 718).

Circuit Judge Hutcheson in his dissenting opinion in this connection said:

> "In so holding, the court erroneously held, in effect, that it was not necessary for the state to prove the existence of the scheme it had alleged, or indeed any scheme calculated to defraud; it was sufficient if the jury believed not that defendant had, as charged, devised a scheme to place the houses on his land under such conditions that he would acquire the title thereto, but had, with an evil hope and wish not exhibited in the scheme he charged but entertained in his heart that the state might forget or fail to take the houses off, permitted the wardens to build more expensive houses on his land than had been built on the land of others from whom permission to build houses had been obtained.
>
> "This will not at all do. There are no common law crimes against the United States, U. S. v. Eaton, 144 U. S. 677; Norton v. U. S., 92 F. (2) 756." (R. 722-723).

We respectfully submit that while a scheme to defraud within the meaning of the Act of Congress does not have to be successful, yet, it must be calculated in some way to defraud. The words "to defraud" usually signify the deprivation of something of value by trick or deceit, etc. FASULO v. U. S., 272 U. S., 620; HAMMERSCHMIDT v. U. S., 266 U. S., 182.

Therefore, we say that even if petitioner had schemed to have these houses placed upon his lands that they were placed there under such circumstances that he could have never acquired title to them and the scheme could not have been calculated to defraud the State or the State Highway Department.

In the case of NORTON v. U. S. 92 Federal Reporter, 2nd Series, on page 755, we find the following statement in this connection:

> "It is stated that, "If the scheme or artifice in its necessary consequence is one which is calculated to injure another, to deprive him of his property wrongfully, then it is to defraud within the meaning of the statute."

The quotation in the Norton case is from HORMAN v. U. S., 116 Federal, 350, 352, from the Sixth Circuit Court of Appeals.

In discussing the Horman case and the above quotation from it this Court said in the case of FASULO v. UNITED STATES, 272 U. S., 620, 47 Supreme Court Reporter, 200, and in the case of HAMMERSCHMIDT v. UNITED STATES, 265 U. S., 182, 44 Supreme Court Reporter 511 that the Horman case went to the verge and that since that decision Section 5480 had been amended to make its scope clearer and that the construction of the Act could not be used as authority to include all dishonest methods of deprivation the gist of which is the use of the mails.

However, this Court in both the Hammerschmidt case and the Fasulo case evidently approved the statement in the Horman case that it is the necessary consequence of the scheme or artifice that it be calculated to injure another.

Therefore, we insist that no scheme which might be inferred from any circumstance in this case could be calculated to injure the State of Georgia or the State Highway Board of Georgia.

(c) There was no evidence of any intent to defraud produced in the case and the circumstances surrounding the placing of these houses on petitioner's lands were explained fully by the witnesses for the Government and petitioner. This testimony was uncontradicted and undisputed, probable and consistent with all of the circumstances of the case.

In the case of NORTON v. U. S., 92 Federal, 2nd, 753, the Circuit Court of Appeals for the Sixth Circuit held:

> "Intent to defraud is essential element of offense of using mails to defraud, and there can be no such intent where party making representations knows that no deception can result."

In the body of the opinion in the Norton case we find on pages 754 and 755 the following:

> "(1) On its face the indictment appears to present a scheme to defraud Gable by representing to him that he is the father of appellant's child, conceived and born in England. Since the intended victim had not been in England he could not have been tricked by this falsehood. It is not, however, a necessary ingredient of the offense punishable by the statute that the one toward whom false representations are directed shall actually be misled by them. The circumstances may

> be such as to render him immune to deception. Hill v. U. S. (C. C. A. 5, 1934) 73 F. (2d) 223.
>
> "(2) But intent to defraud is an essential element of the offense. The person devising the fraudulent scheme must intend in some manner to delude the person upon whom the scheme is practiced. There can be no intent to deceive where it is known to the party making the representations that no deception can result."

In this case we say there could have been no deception and therefore no intent to defraud.

The universal and unvarying rule of the Highway Department, known to the petitioner, and testified to by every witness in the case was that wardens' houses were to be placed upon lands of individuals and then moved when the convict camp was moved. This is undisputed in the case.

The members of the State Highway Board held responsible positions and were intelligent men. The petitioner, according to the testimony in this case held a very responsible position with the State of Georgia and was a very intelligent man.

The only way that any fraud or intent to defraud could have possibly gotten into this case would have been under some circumstances whereby the petitioner had tricked the Highway Board and placed the buildings on his lands under such conditions as would have prevented the Highway Board from removing them.

This was not true in this case under the undisputed testimony and every circumstance surrounding the case.

On account of the fact that the petitioner and all the wardens and officials of the Highway Board knew of the custom and practice of the Highway Board there are no conditions under which the petitioner could have placed these buildings on lands belonging to him whereby the buildings or improvements would have become a part of his real estate.

Therefore, for any fraud or intent to defraud to exist in this case it must have been with reference to some facts such as these detailed and not the fact that they were placed on his own lands.

The placing of the houses on his lands under these circumstances could never be any fraud and no deception could therefore result.

Consequently, the petitioner, being an intelligent man and holding a responsible position, was obliged to know that no deception could result on account of his knowledge of the practice and custom of the Highway Department and his knowledge of the fact that the custom and practice of the Highway Board was well known not only by the present officials in office but their predecessors in office.

2. The gist of the indictment as alleged was that the petitioner violated the rule, plan and practice of the Highway Board and placed upon his lands buildings and improvements under circumstances which made them a part of his realty. This being the case the allegations in the indictment as to the rule, plan and practice were material and the holding by the Circuit Court of Appeals that the rule, plan and practice of the Highway Board was mere surplusage is error and is contrary to the law.

3. Likewise, it was error when the Circuit Court of Appeals held that it was wholly immaterial

in this case if the Government failed to prove that the houses were placed on the lands of petitioner under circumstances which made them a part of the realty. If the houses and improvements did not become a part of the realty and did not become the property of petitioner there should be no conviction in this case. Otherwise, he could not have profited and the State could not have been defrauded.

4. However, if we should be wrong in our opinion that the District Court should have directed a verdict of not guilty in favor of petitioner then we submit that the District Court should have submitted petitioner's defense to the jury as requested in writing. The petitioner moved for a directed verdict upon the trial of his case, and in the alternative, for special charges submitting his defense, to the effect that if the houses were placed on his property, under an agreement that they were removable, their placing there was not and could not be fraud. The district judge refused these requests to charge and the majority opinion of the Circuit Court of Appeals affirmed his refusal on the ground that it was wholly immaterial "whether or not under the circumstances of each transaction, the state at all times had the right to remove the houses at will."

In this connection Circuit Judge Hutcheson in his dissent said:

> "In so holding, the court erroneously held, in effect, that it was not necessary for the state to prove the existence of the scheme it had alleged, or indeed any scheme calculated to defraud; it was sufficient if the jury believed not that defendant had, as charged, devised a scheme

to place the houses on his land under such conditions that he would acquire the title thereto, but had, with an evil hope and wish not exhibited in the scheme he charged but entertained in his heart that the state might forget or fail to take the houses off, permitted the wardens to build more expensive houses on his land than had been built on the land of others from whom permission to build houses had been obtained.

"This will not at all do. There are no common law crimes against the United States, U. S. v. Eaton, 144 U. S. 677; Norton v. U. S., 92 F. (2) 756." (R. 722-723).

The evidence in regard to the removability of houses was undisputed and uncontradicted and we pectfully submit for the Court to dismiss this im-tant point by saying that the entire matter is olly immaterial was error and is contrary to law and the dicisions of this Court and the failure of the irt to charge as requested and the failure of the cuit Court of Appeals to reverse the District Court s clearly in error.

It was very material to petitioner that if the e was to be submitted to the jury that his defense submited fairly and that the failure of the court to so was error and the case should be reversed.

The majority opinion of the Circuit Court of peals held that the District Court's refusal to give se requested instructions was not error (R. 719).

If for no other reason the requests to charge should have been given for the reason that jurors generally know that the Statute of Frauds in Georgia usually requires all contracts and agreements with reference to title to real estate to be in writing. This is one of the exceptions to the general law and jurors and the public generally are not familiar with the exceptions to the Statute of Frauds and the petitioner was entitled to have had this point made clear to the jury at least.

5. Conclusion.— If the judgment of the District Court and the Circuit Court of Appeals is allowed to stand in this case, then we must sanction the doctrine that in case of indictment under the Mail Fraud Statute it is not necessary to prove the existence of the scheme to defraud as alleged in the indictment, or of any kind of scheme calculated to defraud. Then, the use of the Mail Fraud Statute as a catch-all will be encouraged and the conduct of trials under the statute will be so lax and loose until it will be impossible for an innocent person to ever prepare a defense.

Already it is well known among trial lawyers in criminal cases that less evidence is required to convict in a prosecution for violation of the Mail Fraud Statute than even for recovery in civil cases. The decisions of the courts in reference to the limits that the Government may go in this connection have not been clearly defined and, in view of the possible abuse that may be made of the Mail Fraud Statute, we are of the opinion that this Court should take jurisdiction of this case, pass upon the questions which have been raised and clearly define the law applicable thereto.

It is most respectfully submitted, therefore, that this case is one calling for the exercise of this

Court's power of supervision by granting the writ of certiorari and reviewing and reversing the decision of the Honorable United States Circuit Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Roy V. Harris

W. Paul Carpenter

ATTORNEYS FOR PETITIONER.

No. 1055

In the Supreme Court of the United States

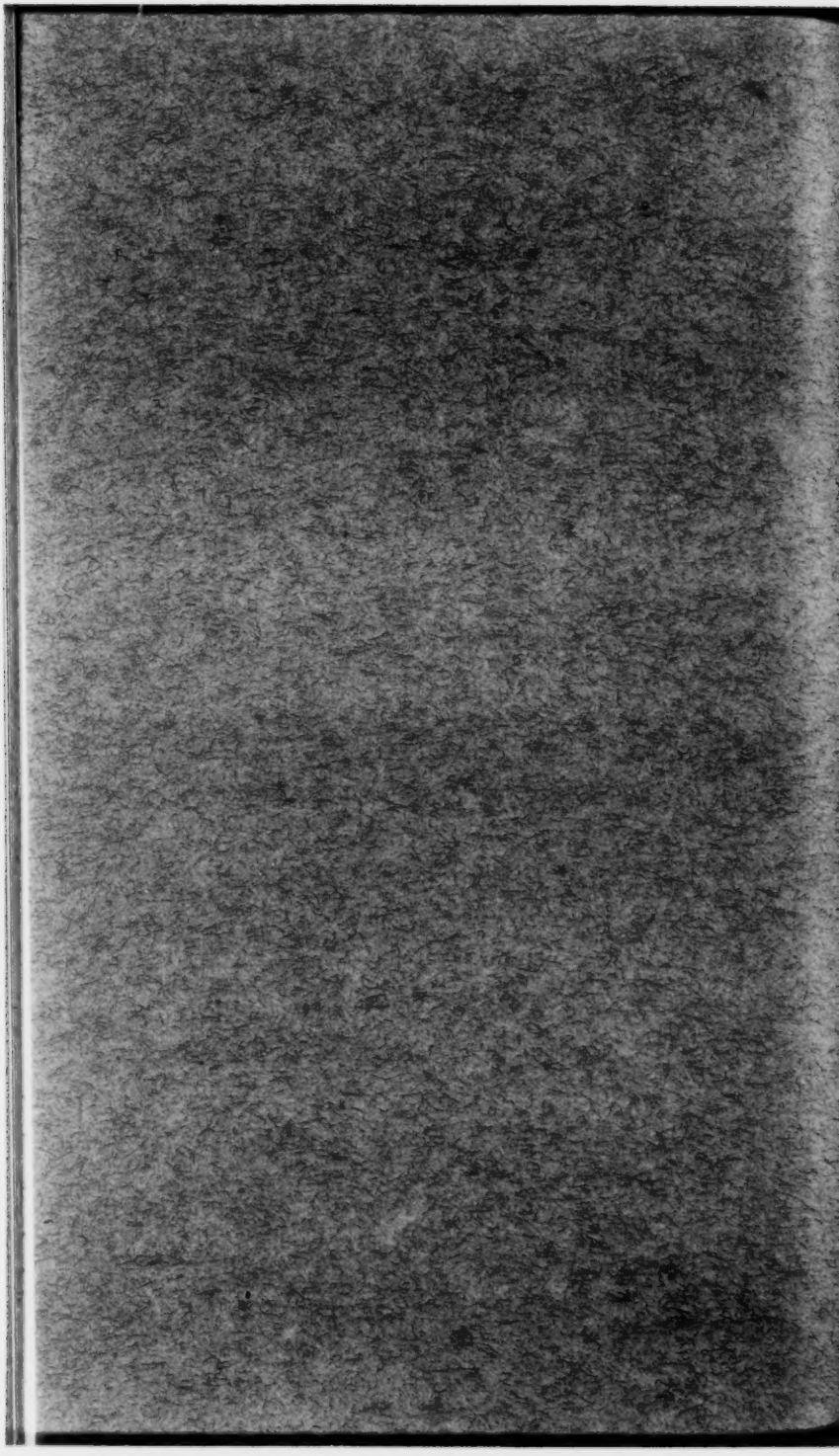
October Term, 1941

J. G. [illegible]

[illegible]

ON PETITION [illegible]
STATES [illegible]
CIRCUIT

BRIEF [illegible]



INDEX

CITATIONS

460105—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1158

J. G. GLOVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 714–723) are reported at 125 F. (2d) 291.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 23, 1942 (R. 723), and rehearing was denied on March 23, 1942 (R. 758, 818). A petition for a writ of certiorari was filed April 20, 1942. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether a scheme by a state official to cause buildings to be erected upon his private property, by state labor and with state materials and funds, constitutes a scheme to defraud within the meaning of the mail fraud statute.

STATUTE INVOLVED

The mail fraud statute (Section 215 of the Criminal Code, 18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such

letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner was charged in a 20 count indictment returned in the Northern District of Georgia with using the mails in execution of a scheme to defraud, in violation of Section 215 of the Criminal Code. The indictment alleged: As Supervisor of State Forces of the Georgia Highway Board, petitioner occupied an office and position of public trust and was charged with the duty of supervising and managing state convicts and other forces engaged in highway construction, with establishing, constructing, and maintaining prison camps, and with erecting and installing buildings thereon.[1] It was the plan, rule, and practice of the Highway Board that necessary structures for prison camps should be constructed upon lands leased by the Board for that purpose with the understanding that when the land ceased to be used by the State, the leases would be terminated and the buildings constructed upon the leased premises would become the property of the lessors. Petitioner devised and intended to devise a scheme to defraud the Highway Department, the State, and the taxpayers, of large sums of money by

[1] For a description of petitioner's duties, see R. 244, 432–433, 579–580.

acquiring in his own name lands adjacent or near to prison camp sites and erecting thereon with state labor, funds, and materials, expensive houses and other improvements, which ostensibly were for the use of camp wardens, but actually were for his own use and benefit. In carrying out his scheme petitioner made use of the mails (R. 5–44).

Petitioner was convicted on all 20 counts of the indictment (R. 45), the verdict was subsequently set aside as to two of the counts (R. 702), and he received concurrent sentences of a year and a day on each of the remaining 18 counts (R. 45–46). The circuit court of appeals, one judge dissenting, affirmed his conviction (R. 714–723).

The Government's case may be summarized as follows:

The Dawson County house.—In Dawson County, Georgia, petitioner, through an intermediary, acquired an eight-acre plot adjacent to a prison camp at a cost of $140 from one Crane who also owned the property upon which the camp was located (R. 47, 50–51, 52). The camp was situated in a valley, and petitioner instructed the camp warden to build a "roomy, good comfortable place" (R. 62–63, 73) upon a hill about 600 or 700 feet distant (R. 52), although it could have been constructed on the property leased by the state from Crane (R. 60). A six-room house was constructed having screened sleeping porch, front porch, bathroom, electric lights, stone and cement

foundation, concrete steps to the basement, paved driveway, and a garage with a concrete floor (R. 63–66). A wire fence was constructed around petitioner's entire eight-acre plot (R. 372). At petitioner's direction a spring was boxed in with concrete (R. 54, 63), a cement basement built (R. 65), and an electric pump and an 800-gallon water tank installed (R. 54). The house had permanent electric wiring (R. 115). A ramp was built across a gulley to the highway, which it was estimated required 4,000 cubic yards of dirt costing 20 cents a yard (R. 53, 63).

The house was occupied by an unmarried warden (R. 55), and petitioner admitted that it was more elaborate and expensive than he would have constructed for himself. (R. 559, 616). Petitioner and a party of friends at one time stayed at the house for several days (R. 64, 71–72, 402–404).

The Dade County house.—In Dade County, petitioner, stating that he desired to erect a summer cottage (R. 123), instituted negotiations as a result of which he procured, at a cost of $450 (R. 122) a five-acre tract (R. 107) on a bluff overlooking a scenic highway (R. 108, 121–122). At petitioner's direction, the warden constructed at a point on the bluff indicated by petitioner (R. 120–121), and about 1.5 or 1.6 miles from the camp (R. 123, 142), a house having a composition roof, cemented rock foundation, storm sheeted

walls, screened sleeping porch, a basement with a concrete floor, and cemented rock steps (R. 122-124). Work was begun on this house about a month after the deed to the property upon which it was situated was delivered to petitioner (R. 122). There was also constructed a septic tank, rock driveway (R. 107), a pump with a concrete floor (R. 111), a Delco lighting system (R. 118, 126), and a well (R. 118–119, 136–137).

The Miller County house.—Petitioner also acquired indirectly certain property in Miller County (R. 155–156, 162). The County Board of Miller County, by resolution, authorized the sale of a lot in Colquitt to the camp warden (R. 176), but the deed thereto was made to petitioner on February 16, 1940, at his suggestion (R. 155–156). The price of the tract was $50 (R. 162), which seems never to have been paid (R. 185). The house constructed on this plot consisted of a living room, two bed rooms, a dining room, kitchen, and bath (R. 162), and a sewage disposal system (R. 182).

Concealment of facts from Highway Board.—All of these houses and improvements were admittedly constructed with convict and other labor furnished by the Highway Board, and all of the material used was paid for by the state without the Board or the state disbursing officers being aware that the structures were being placed on

petitioner's land (R. 150–151, 237–238, 276, 278, 296–297, 427). Petitioner admitted that he did not tell the members of the Highway Board of the construction done upon his property and stated that "if they did ask me, I planned to tell them when they wanted to know" (R. 629). The Board was first advised of petitioner's activities by post office inspectors and the United States Attorney (R. 141, 238, 297, 453).

Although petitioner was instructed by the Board to build all wardens' houses as cheaply as possible (R. 294, 308) and as temporary structures (R. 300), the houses built on his lands were of a permanent type and much more expensive and elaborate than those built at other camps.[2] Requisitions and pay rolls were approved by petitioner (R. 211–213, 216–220, 231, 233–236). Ma-

[2] It was estimated that the Dawson County house cost from $4,000 to $5,000, that the Dade County house cost $3,319, and that the power plant erected in connection therewith cost $1,675 (R. 202, 205, 318). In contrast, the estimates in connection with wardens' houses in other camps were: Soperton, $450 to $600 (R. 202, 207, 281, 282–283), and $1,060 (R. 317); Hamilton, $700 or $750 (R. 206); Hortense, $2,015 (R. 317); Lakeland, $1,796 (R. 327). Only the Dawson and Dade County houses had stone foundations and subfloors; only the Dawson County house had copper screens, and only the Dade County house had a built-in bathtub and wallpaper (R. 339). No salvage could be made of the septic tank, shingles, roofing, concrete and rock work (R. 339–340) and much of the flooring (R. 382) in the Dawson and Dade County houses and, of course, "all the erection labor would be lost" (R. 339).

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terials were purchased by means of emergency "confirmation purchase orders" for less than $100 which were "automatically approved" for payment without submission to the Highway Board or the State Purchasing Department (R. 288, 440, 441).

After an investigation of petitioner had been under way for some time, he endeavored to convey the three houses to the Highway Board (R. 238). However, the deed tendered on the Dawson County tract conveyed a plot only 75 feet square, without any right of ingress and egress over petitioner's property, which entirely surrounded it (R. 250, 404–405). The water tank and spring pump were not included (R. 54–55). The Dade County deed described a plot 50 x 75 feet, which did not include the driveway, septic tank, garage, pump house, and servants' quarters (R. 108). These deeds were not accepted by the Highway Board, which was advised by counsel that they were unnecessary and that the Board had authority to remove the structures on petitioner's land, since petitioner had, in dereliction of his duty as a public official, improperly and without permission caused them to be erected upon his own property with state labor, material, and funds (R. 251).

On October 14, 1940, which was after petitioner had been indicted, the Highway Board by letter returned the deeds which petitioner had previ-

ously submitted (R. 262–263). On October 15, 1940, petitioner replied, quoting from a letter purportedly written by him on December 15, 1939, advising that all wardens' houses and other improvements on lands upon which there were prison camps were subject to removal except where a written agreement provided otherwise. The stenographer, whose initials appeared on the letter, disclaimed ever having written it (R. 645–646, 648–649) and pointed out that December 15, 1939, was an office holiday (R. 645). She stated that the purported copy was first shown to her by petitioner about October 15, 1940 (R. 646). No copy of this letter was found in the place where it would ordinarily be filed (R. 647–648).[3]

Shortly after it was brought to their attention by the post office inspectors that petitioner had constructed houses and other improvements on his own property, the Highway Board caused a claim to be filed with the surety on petitioner's bond (R. 386, 430, 443–445, 450–451, 474–476, 659). Subsequently two members of the Board, Chairman Miller being absent (R. 388), directed that the claim be withdrawn as premature (R. 387–388). This was after a meeting with petitioner and his attorney (R. 635), and apparently after

[3] The letters were all introduced at the trial (R. 650), but are not contained in the printed record filed in this Court having been certified to the court below as original exhibits (R. 704–706).

the Board members had learned of petitioner's indictment (R. 388).

After petitioner had been found guilty (R. 45), according to his motion for new trial (R. 695–698, 700–701), the Board caused the Dawson and Dade County houses to be torn down and removed (R. 700). The houses were therefore used for approximately six months.

ARGUMENT

Petitioner's principal contention is that there is no proof that he "acted under a settled practice of the Highway Board substantially as alleged in the indictment under conditions which would attach the houses to the realty * * *" (Pet. 29). This contention is not only without merit, but is addressed to an immaterial issue.

In the first place, as the court below held (R. 718), the allegation that it was the "plan, rule, and practice" of the Highway Board to permit the buildings to become affixed to the realty (R. 9) was surplusage, for eliminating all reference to it, "the indictment continued to charge a fraudulent scheme and the use of the mails in furtherance thereof." See *Leche* v. *United States,* 118 F. (2d) 246, 247 (C. C. A. 5), certiorari denied, October 13, 1941, No. 169 this Term; *Hart* v. *United States,* 112 F. (2d) 128 (C. C. A. 5), certiorari denied, 311 U. S. 684, 722; cf. *Hall* v. *United States,* 168 U. S. 632, 639.

The essence of the crime charged was that petitioner caused the houses to be built on his property in violation of his fiduciary obligations and that he misled and deceived the Highway Board with the intent to defraud; hence a failure to prove the practice of the Board would not work a fatal variance, as petitioner suggests. Cf. *Berger* v. *United States,* 295 U. S. 78, 82; *Hoke* v. *United States,* 227 U. S. 308, 324. Similarly, this being petitioner's intention, whether the state had the legal right to remove the houses is immaterial. The mail fraud statute denounces devising or intending to devise any scheme or artifice to defraud and is transgressed by one who in a position of trust, public or private, seeks to derive from his fiduciary relationship a profit to which he is not entitled, at the expense of those whom he is supposed to serve.[4] *Groves* v. *United States,* 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, October 27, 1941, No. 605, this Term; *Leche* v. *United States,* 118 F. (2d) 246 (C. C. A. 5), certiorari denied, October 13, 1941, No. 169 this Term; *Shushan* v. *United States,* 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied, 313 U. S. 574; *Buckner* v. *United States,* 108 F. (2d) 921, 926–927 (C. C. A. 2), certiorari denied, 309

[4] The scheme need not be outlined with particularity, since the gist of the offense is the use of the mails. *Cowl* v. *United States,* 35 F. (2d) 794, 798 (C. C. A. 8); *Lee* v. *United States,* 91 F. (2d) 326, 329 (C. C. A. 5), certiorari denied, 302 U. S. 745.

U. S. 669.[5] Petitioner's breach of his fiduciary obligations was complete when he caused wardens' houses of a much more expensive and permanent character than he was authorized to build to be erected with state labor, equipment, materials, and funds on his property with the intent that such houses would not be removed by the state but would be abandoned to his own use and benefit. The fact that this anticipated result was not or could not be realized is of no importance, for it is not essential that a scheme result in gain to the perpetrator to be condemned by the mail fraud statute. *Linn* v. *United States,* 234 Fed. 543, 545 (C. C. A. 7); *Calnay* v. *United States,* 1 F. (2d) 926, 927 (C. C. A. 9); *Butler* v. *United States,* 53 F. (2d) 800, 804 (C. C. A. 10). Nor is a scheme to defraud any less fraudulent because it may be frustrated by affirmative action on the part of the person intended to be defrauded or because it is not reasonable, practical, or successful. *Norman* v. *United States,* 100 F. (2d) 905, 907 (C. C. A. 6), certiorari denied, 306 U. S. 660; *Gridley* v. *United States,* 44 F. (2d) 716, 735 (C. C. A. 6), certiorari denied, 283 U. S. 827; *Byron* v. *United States,* 273 Fed. 769, 772 (C. C. A. 9), certiorari denied, 257 U. S. 653; *Grant* v. *United States,* 268 Fed. 443 (C. C.

[5] For a more exhaustive exposition of the controlling theory, see pages 14–16 of the Government's brief in opposition in the *Shushan* case, Nos. 910–913, last Term.

A. 6), certiorari denied, 256 U. S. 700; *LeMore* v. *United States,* 253 Fed. 887 (C. C. A. 5), certiorari denied, 248 U. S. 586.

In the second place, we think there was evidence from which the jury reasonably could conclude that it was, ordinarily, the practice of the Board not to remove the houses when camp sites were abandoned. Chairman Miller, of the Highway Board, testified that it was the practice not to remove buildings except where specifically agreed in written leases (R. 294, 302, 304–305, 308).[6] It was petitioner's responsibility to acquire the necessary sites and he usually negotiated or approved all leases or agreements (R. 623, 585, 587, 590, 592, 593, 612, 619, 620, 654). One lessor testified that petitioner in negotiating an agreement said that the Board would "let the property stay there when we are through" (R. 654), and another testified that his oral agreement with the Board, negotiated with petitioner, provided that "The buildings were to stay on the ground, go with the land" (R. 664). As to another lessor petitioner admitted "that the office

[6] The Chairman was to a certain extent contradicted by other members of the Board (R. 241–242, 245, 279, 418), but one of them admitted that he did "not know of any warden's house that has ever been moved that was constructed by the State" (R. 260), and in the circumstances he felt that whether the houses placed on petitioner's property could be taken away was a legal question depending possibly upon "the discretion of the Court" (R. 242).

building and guards' quarters would be left on the land when we moved away" (R. 594).

Finally, contrary to petitioner's claim (Pet. 25–28), it is by no means clear that the houses built upon petitioner's land did not become a part of the realty. The Georgia cases cited by petitioner (Pet. 28) lend no support to his argument that the houses remained personalty and that there was a right of removal in the state, notwithstanding the Statute of Frauds (Section 20–401 (4) Georgia Code). But assuming, arguendo, that Section 85–1404 of the Georgia Code would authorize a parol agreement for the removal of the houses, petitioner had no agreement of any sort, express or implied, with the Highway Board in this case. The Board, as a result of petitioner's concealment, was not even aware that the structures were being placed on his property. Petitioner's self-serving statements to the wardens, his subordinates (R. 432), made after it was common knowledge that he was under investigation (R. 126–127, 130–131), to the effect that the State was free to remove the houses,[7] were in no sense agreements with the Highway Board or the State

[7] No such statement seems ever to have been made to the Dawson County Warden and petitioner's record references (Pet. 11, 25) point to none. It is not clear when the declarations with respect to the Miller County house, the least valuable of three, were made (see R. 162).

of Georgia. It seems wholly unlikely, therefore, that such unilateral declarations would result in an exception to Section 85–201 of the Georgia Code, which provides that realty includes all lands and buildings thereon and all things permanently attached to either. Indeed, the Board was advised by an attorney in the State Legal Department that the houses were removable, not because of any agreement between petitioner and the Board, but because petitioner "as an agent of the State, could not legally divert public funds to private use, and for that reason these houses, having been built by the State, were public funds; that for him to have retained title it would have been necessary for him to have had an agreement with himself, which was impossible under the law" (R. 251).

Furthermore, the right of removal was of limited value to the state. Much of the materials which went into the houses and, more particularly, into the other improvements could not be salvaged. Among these were the septic tank, shingles, roofing, concrete and rock work (R. 339–340) and some of the flooring (R. 382). Such things as ramps, driveways, cemented springs, were not susceptible of removal. It is apparent, therefore, that the state was clearly defrauded, since the exercise of the right of removal for which petitioner contends could not make the state whole.

CONCLUSION

The case was correctly decided below, and there is neither conflict of decisions nor any question of general importance. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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